No. 82-1381

IN THE

Supreme Court of the United States

October Term, 1982

MICHAEL McCRAY,
Petitioner,

—*v.*—

THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF AND APPENDIX IN SUPPORT OF THE PETITION

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Questions Presented

1. Whether the sixth amendment right to trial by jury, made applicable to the states through the fourteenth amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968), prohibits the use of the peremptory challenge in a criminal case to exclude prospective jurors solely on the basis of race.

2. Whether the equal protection or due process clause of the fourteenth amendment prohibits the use of the peremptory challenge to exclude prospective jurors in a particular case solely on the basis of race, notwithstanding the holding in *Swain v. Alabama*, 380 U.S. 202 (1965), that such exclusion would constitute a denial of equal protection only if it occurred on a systematic basis in case after case over a period of time.

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RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION

The Respondent, the State of New York, respectfully requests that this Court grant the petition for writ of certiorari, seeking review of the decision of the New York Court of Appeals in this case. That opinion is reported at 57 N.Y.2d 542.

Opinions Below

The opinion of the Court of Appeals of the State of New York appears at 57 N.Y.2d 542. That decision is reproduced in Petitioner's Appendix at 1a-40a. The decision of the Appellate Division of the Supreme Court of the State of New York, Second Department, is an affirm-

ance without opinion, reported at 84 A.D.2d 769. The opinion of the Supreme Court, Kings County, denying petitioner's post-conviction motion was delivered orally and never reported; a transcript appears in Respondent's Appendix at 1a-7a. The decision of the trial court denying petitioner's motion during voir dire was originally rendered orally, and a transcript appears in Petitioner's Appendix at 51a-67a; that decision was later set forth in a memorandum opinion which is reported at 104 Misc. 2d 782.

Jurisdiction

The judgment of the Court of Appeals for the State of New York was entered on December 14, 1982. The petition for certiorari was filed within 60 days of that date. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). Alternatively, this petition may be treated as an appeal, invoking this Court's jurisdiction under 28 U.S.C. § 1257(2).

Statutory and Constitutional Provisions Involved

New York Criminal Procedure Law § 270.25:

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed the following number of peremptory challenges:

* * *

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Introduction

Michael McCray was convicted after a jury trial in Supreme Court, Kings County, of Robbery in the First Degree and Robbery in the Second Degree [New York Penal Law § 160.15(4) and § 160.10(1)].

He was sentenced on February 19, 1981, to concurrent terms of imprisonment of from two to six years for the Robbery in the First Degree, and from one and one-half to four and one-half years for the Robbery in the Second Degree. The conviction was unanimously affirmed by the Appellate Division, Second Department. 84 A.D.2d 769. That judgment was affirmed by a closely divided Court of Appeals on December 14, 1982. 57 N.Y.2d 542.

McCray is presently at liberty pursuant to a stay of execution granted by Justice Marshall until disposition of this petition for a writ of certiorari.

The Evidence at Trial

Michael McCray was convicted of a gunpoint robbery of Philip Roberts on the evening of November 15, 1978.

McCray and two companions [1] watched Roberts, an art student, withdraw money from a bank cash dispensing machine, and then pushed him into the vestibule of an apartment building and took his keys and his money.

On two occasions Roberts drove around the neighborhood with police officers in an unsuccessful effort to locate his assailants. On a third such occasion, three weeks after the robbery, Roberts pointed out McCray from a group of four individuals standing on a corner, and the police arrested him.

The Challenge to the Jury Selection

By statute, each party to this litigation was entitled to fifteen peremptory challenges, plus two for each prospective alternate juror. N.Y. Crim. Proc. Law § 270.25 (2)(b). During jury selection, defense counsel moved for a mistrial, claiming that the prosecutor had unlawfully used peremptory challenges to exclude jurors on the basis of race. He moved, in the alternative, for a hearing to inquire into the prosecutor's use of the peremptory challenge.

Defense counsel specifically invoked the equal protection clause of the United States Constitution, and Section 500 of the New York State Judiciary Law, which provides for trial by a jury selected from a fair cross section of the community.

At the time of the motions, the prosecutor had exercised seven peremptory challenges against blacks and one against a Hispanic. In addition, she had exercised three or four peremptory challenges against whites. The record does not show how many blacks or Hispanics were excluded

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[1] The other two participants have not been identified.

by defense counsel, or how many were successfully challenged by either side for cause.

Both motions were denied on April 24, 1980 (Pet. App. 51a-67a). The rulings were subsequently set forth in a memorandum opinion issued after the verdict, on June 13, 1980, and reported at 104 Misc.2d 782.[2]

Jury selection continued, resulting in the selection of twelve jurors and two alternates. While the record is not clear in this regard, it is the recollection of both trial counsel that the twelve jurors were white, and one of the alternates was black (See Resp. App. 2a-5a).

After the April 28 verdict, and after the June 13 opinion on the motion for mistrial, new defense counsel entered the case on June 16. At that time he renewed McCray's objection to the jury selection, moving to set aside the verdict on the ground that the jury selection process had denied McCray a fair and impartial trial. At this time he based his claim on "our Constitution", without specifying either the federal or state constitution. This motion was denied in an oral ruling from the bench (Resp. App. 5a-7a).

On appeal to the Appellate Division, and again in the Court of Appeals, McCray continued to press his claim that the prosecutor unconstitutionally used the peremptory challenge to exclude prospective jurors solely on the basis of race. He based that claim in the state appellate courts on the due process and equal protection clauses of the United States Constitution, as well as the principles of due process and equal protection found in the New York State Constitution. The Appellate Division rejected his claim without opinion. 84 A.D.2d 769. The Court of

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[2] Petitioner incorrectly describes this opinion as a ruling on the post-judgment motion.

Appeals rejected the claim in a lengthy opinion, expressly rejecting not only the state constitutional claims but also the claims based on the sixth amendment right to jury trial and the fourteenth amendment rights to due process and equal protection. 57 N.Y.2d 542.

Reasons For Granting The Writ

1. The Decision Below Raises a Significant and Recurring Question of Law Concerning Race Discrimination in the Jury Selection Process.

The New York Court of Appeals has construed the New York State statute defining the peremptory challenge to permit a party to exclude prospective jurors solely on the basis of race, and that court has upheld the statute against federal constitutional attack.

This Court has never decided whether the racially based use of the peremptory challenge violates the sixth amendment right to a jury drawn from a representative cross section of the community. The Court held in *Swain v. Alabama*, 380 U.S. 202 (1965), that the racially based use of the peremptory challenge did not violate the equal protection clause, unless it was a systematic practice of a particular prosecutor's office, in case after case over a period of time. But *Swain* was decided before the sixth amendment right to a jury trial was made applicable to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and thus it did not decide whether the sixth amendment protects the individual defendant against race discrimination in jury selection, even if the equal protection clause does not.

The holding in *Swain* should be reconsidered, because an individual defendant's rights are as much violated by racial discrimination in a single case as by racial discrimination that is part of a broader pattern and practice.

The equal protection clause prohibits isolated acts of racism as well as systematic racial discrimination. *Swain* is perhaps best understood as an acknowledgement of the fact that it is difficult to prove isolated acts of race discrimination during jury selection, and hence, as a practical matter, only systematic discrimination will ordinarily be detected.

In rejecting the equal protection claim, this Court analyzed the function of the peremptory challenge. The Court reasoned that the challenge is designed to enable counsel to exclude jurors, not only for demonstrable bias, but for "real or imagined partiality that is less easily designated or demonstrable." 380 U.S. at 220. For that purpose, the Court held that it may be necessary in a proper case to consider race and other group affiliations. The Court also invoked pragmatic reasons for rejecting Swain's claim. The rule advanced by Swain, and by the defendant in this case, might require an examination of the prosecutor's reasons for peremptory challenges in every case. The *Swain* Court regarded this prospect as likely to undermine many lawful uses of the peremptory challenge in securing a fair and impartial jury. Finally, an examination of the prosecutor's motives in every case would be burdensome in practice, and would be inconsistent with the presumption that a prosecutor ordinarily acts lawfully. 380 U.S. at 222.

But in fact a number of states have found in their state constitutions a prohibition against the racially based use of the peremptory challenge, and those states have not found it unduly burdensome to administer the rule. This experience, coupled with the fact that the practice of excluding jurors on the basis of race continues to plague the judicial system, provides ample reason to reconsider *Swain*.

Moreover, the Court is free to re-examine the constitutional validity of the practice without disturbing the

holding in *Swain*. This Court has made it clear that jury selection practices may violate the sixth amendment right to a jury drawn from a cross section of the community, even when those practices do not violate the defendant's right to equal protection of the laws. *Taylor v. Louisiana*, 419 U.S. 522, 526-34 (1975).

It is inherent in the very idea of a jury that it must be drawn from a fair cross section of the community, in order that the jury may fairly reflect the common sense judgment of the community. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). The right to a jury trial is clearly violated by the deliberate exclusion of a particular group from jury service on the basis of race, sex, or certain other characteristics. *Taylor v. Louisiana*, 419 U.S. at 528; *Peters v. Kiff*, 407 U.S. 493, 500 (1972). The question presented by this case is whether, when there is a claim that the peremptory challenge has been used to accomplish that deliberate exclusion, the claim is immune from judicial scrutiny.[3] This Court should hold that it is not.

While the peremptory challenge is an important and traditional part of the statutory scheme for jury selection, N.Y. Crim. Proc. Law § 270.25, it is not more impor-

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[3] This case squarely presents the issue, because the defendant claimed that the prosecutor was excluding prospective jurors on the basis of race, and the trial court denied a hearing on that issue and rejected the claim. The State contends that no such discrimination in fact occurred, and that even under the constitutional rule defendant seeks, he would not be entited to a hearing or a reversal of his conviction. That factual claim is not, however, free from doubt, and it was rejected by the dissenters below. It should not, therefore, constitute a bar to review of the decision by this Court.

Indeed, review in this case would also be proper under the mandatory appellate jurisdiction conferred on this Court by 28 U.S.C. § 1257(2), because in the decision below, a state court upheld a state statute against federal constitutional attack.

tant than the sixth amendment guarantee of trial by a jury drawn from a fair cross section of the community. The sixth amendment guarantees the right to a jury selected in a manner that provides a fair possibility of drawing persons of every race, sex, religion, and national origin represented in the community. While there is no requirement that every group be actually represented on the jury, every group must have a reasonable chance of being represented on the jury. The peremptory challenge may not constitutionally be used to defeat that right.

2. The Decision Below Conflicts with the Decisions of Other State Courts, and the Conflict is Likely to Grow as a Result of Widespread Litigation of the Issue in Numerous State Courts.

Intermediate appellate courts in California, Illinois, and New York recently held that the sixth amendment prohibits the racially based use of the peremptory challenge.[4] *People v. Lucero*, 99 Cal. App. 3d 17 (1979); *People v. Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982); *People v. Thompson*, 79 A.D.2d 87, 93-94, 435 N.Y.S.2d 739, 745-46 (2d Dep't 1981), *appeal withdrawn*, 55 N.Y.2d 879 (1982). In both Illinois and New York, the decisions were subsequently overruled by the highest state court. *People v. Davis*, 32 Crim. L. Rep. 2463 (Ill. Feb. 18, 1983); *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982). Nevertheless, these decisions created considerable uncertainty, in a pattern that is likely to recur as other states consider the issue. *Cf. State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (1980) (questioning continuing vitality of *Swain*).

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[4] No federal court has so construed the sixth amendment. *See United States v. Newman*, 549 F.2d 240 (2d Cir. 1977); *United States v. Pearson*, 448 F.2d 1207 (5th Cir. 1971); *Green v. United States*, 486 F. Supp. 199 (W.D. Mo. 1980).

Moreover, several state courts have found in their state constitutions a prohibition on the use of the peremptory challenge to exclude jurors on the basis of race. The California Supreme Court held in 1978 that the use of peremptory challenges by either the prosecutor or defense counsel to remove prospective jurors on the basis of race and certain other characteristics violates the right to trial by jury as guaranteed by the California Constitution. *People v. Wheeler*, 22 Cal.3d 258, 277-78, 283 n.29, 583 P.2d 748, 761-62, 765 n.29, 148 Cal. Rptr. 890, 903, 907 n.29 (1978).

Other state courts have followed *Wheeler*, and construed their state constitutions similarly. *See, e.g., Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (1980); *cf., People v. Smith*, 622 P.2d 90 (Colo. Ct. App. 1980); *State v. Brown*, 371 So.2d 751 (La. 1979).[5]

This issue is now being litigated in one state after another. In each case, the courts have been troubled by the relevance of *Swain* and of the sixth amendment, as

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[5] Other state courts have followed *Swain* in refusing to construe their state constitutions to prohibit the racially based use of the peremptory challenge in a particular case. These courts hold that a constitutional claim is stated only by a charge that the prosecutor is systematically excluding blacks from juries in many cases over a period of time. *See, e.g., Pippin v. State*, 151 Ga. App. 225, 259 S.E.2d 488 (1979); *People v. Davis*, 32 Crim. L. Rep. 2463 (Ill. Feb. 18, 1983); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979); *Lawrence v. Maryland*, 51 Md. App. 575, 444 A.2d 478 (1982); *State v. Davis*, 529 S.W.2d 10 (Mo. App. 1975); *Commonwealth v. Henderson*, 497 Pa. 23, 438 A.2d 951 (1981); *Drew v. Tennessee*, 588 S.W.2d 562 (Tenn. Crim. App. 1979); *State v. Grady*, 93 Wis.2d 1, 286 N.W.2d 607 (Wis. App. 1979). *See generally*, Annot., Use of Peremptory Challenge to Exclude from Jury Persons Belonging to Class or Race, 79 A.L.R.3d 14 (1977).

well as by their own state constitutions. This Court should eliminate the confusion in the lower courts and decide whether the sixth amendment prohibits the racially based use of the peremptory challenge.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

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Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

CRIMINAL TERM: PART 28

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

MICHAEL MCCRAY,

Defendant.

Indictment No. 4189/78 June 16, 1980

CENTRAL COURT BUILDING
120 Schermerhorn Street
Brooklyn, New York

BEFORE:

THE HONORABLE JAMES G. STARKEY,
Justice.

APPEARANCES:

KEVIN MCNAUGHTON, ESQ.,
Assistant District Attorney,
Appearing for the People
COURTENAY WILTSHIRE, Esq.,
166 Montague Street,
Brooklyn, New York,
Appearing for the Defendant

KENNETH LETTS
Official Court Reporter

* * *

MR. WILTSHIRE: At this time I'd like to make a motion, which might have been made by Mr. Deckler before.

THE COURT: Yes.

Motion

MR. WILTSHIRE: But I'm making a motion to set aside the verdict on the grounds that this defendant was not afforded a fair and impartial trial based upon the voir dire, or the selection of the jury.

Now, in basing my motion—I'm basing my motion on information furnished to me, from what I have read in the record and from the notes of what Mr. Deckler tells me.

THE COURT: Are you talking about the manner in which peremptory challenges were exercised?

MR. WILTSHIRE: What's that?

THE COURT: I said, are you talking about the manner in which peremptory challenges were exercised?

MR. WILTSHIRE: Yes, that's right.

Now, our constitution sets forth the fact that a defendant is entitled to be tried by a jury of his own peers.

Now, in the first trial, as I was told, we had a hung jury. On that jury there were nine whites and three blacks.

I was informed that the three blacks were against convicting this defendant. As a result of that there was a mistrial. Based upon what I was told.

On the second trial we find the District Attorney of Kings County used peremptory challenges as a subterfuge to select twelve jurors that were non-black.

THE COURT: I'm not sure that was the case, Mr. Wiltshire.

MR. WILTSHIRE: Judge, I want to go on the record in what I was told. Now—

Motion

THE COURT: Just a moment. My memory's a bit hazy, but what is your source and authority for the proposition—

MR. WILTSHIRE: My source is from what Mr. Deckler told me on the telephone.

Now, you know, telephone conversations are not too reliable, but I know Mr. Deckler and I recall he told me that I have not been able to review his entire record because the record was not available to me. But I'm making this as a blanket motion.

THE COURT: What I'm saying, Mr. Wiltshire, is that after all is said and done it seems to me that the motion you are making assumes a fact that is not in evidence, after all is said and done.

I start with the proposition that according to my recollection the motion for mistrial essentially on the grounds that the prosecution was using its peremptory challenges to challenge those who were people of the same race as the defendant was made about halfway through jury selection.

MR. WILTSHIRE: Well, Judge, did Mr. Deckler challenge that, if he made the challenge?

THE COURT: Just—yes. According to my recollection also—and it is subject to correction, of course, if I'm in error—the point was not raised or urged anymore after that motion midway through jury selection.

That is to say after all is said and done I suspect the transcript does not show that the jurors, all of them selected after that motion had been denied, were all white.

Do you follow me?

MR. WILTSHIRE: I follow you.

THE COURT: Further, because of my inexact memory and the time lapse since then, and human frailty I guess generally, I am unequipped to say, remember, after all is said and done, whether in fact there were some black jurors, one or more, in the group selected after that motion had been made.

And correct me if I'm wrong, the record doesn't say that they were all white, yes?

MR. WILTSHIRE: But, Judge, I mean if he did make that motion at any time during the voir dire, at any time, still I feel—

THE COURT: Oh, yes. I understand your point, Mr. Wiltshire. I was simply addressing myself to a statement you made a moment ago, which I suspect is unsupported by the record, that is, that the jury that ultimately tried the case was composed entirely of white jurors.

MR. WILTSHIRE: Well, in considering human frailty, memory and so forth, I'm just making that statement so that it may be preserved on the appeal.

THE COURT: Sure. I did not want a statement like that, which does not necessarily, according with my recollection, and further in the face of some doubt that the transcript, the trial record, supports it, to stand uncontradicted.

MR. WILTSHIRE: I understand that, Judge. Because I'm at a disadvantage because I was not the trial attorney. But I merely want to go on record as making that statement now.

THE COURT: Yes.

MR. WILTSHIRE: To set aside the verdict on the basis already mentioned.

At this time, after making that motion, I'm ready for —unless the district attorney may want to respond.

MR. MC NAUGHTON: Well, your Honor, I was not the trial attorney in this case. Miss Litwin was the assistant district attorney who presented the case. I'm sure counsel is suggesting he has a right to have an entirely black jury. I'm sure she did not exercise the challenges in the manner in which counsel suggests. I was not the attorney who was present. I do not know what the makeup of the jury was. However, I am familiar with case law, which would allow a district attorney to exercise his peremptory challenges in any way he sees fit short of excluding on a systematic basis people of the same race as the defendant. I'm sure that that wasn't done in this case. However, I don't really want to address myself to the merits of counsel's claim, because I was not present. Counsel's not aware of the facts and I'm not sure what the jury makeup was and how the challenges were exercised in this case.

THE COURT: Yes.

MR. MC NAUGHTON: Excuse me, your Honor. Could we approach for a minute?

THE COURT: Yes.

(Whereupon there was an off-the-record bench conference among the Court and both counsel, after which the following occured:)

MR. WILTSHIRE: We're ready now for sentencing, Judge.

THE COURT: Mr. Wiltshire, the motion is denied, as it was when made in the first instance. Though the question raised, it seems to me now, and it did then, is one that would be deserved of a bit more discussion of the

legal principles that apply. And a decision will be filed dealing with those issues I think probably later today. So though the discussion is necessarily brief at this point, the Supreme Court decision Swayne (phonetic) against Alabama seems controlling to me on the issue, and says, after all is said and done, and seems to me with some cogency, that the exercise of peremptory challenges solely and exclusively on the basis of race is improper, but that the exercise of peremptory challenges for the purpose of excusing prospective jurors of the same race, national heritage, religious persuasion or whatever, as the defendant, is a whole different story. And therefore to challenge Irishmen in jury selection where the defendant is an Irishman, Armenians when the defendant is an Armenian and blacks where the defendant is black is not a challenge based upon race, for example, but rather on potential affinity, at least presumptively. And that potential affinity is, after all is said and done, historically one that has been deemed a reasonable and acceptable approach to jury selection.

As said in substance by the Supreme Court at one point in Faye against the State of New York, "A defendant is entitled to a fair jury; he is not entitled to friends on the jury."

That being the case, the Supreme Court has said that the manner in which challenges are exercised in a single case must, presumptively, be viewed or viewed presumptively as one exercised in accord with the historically acceptable potential affinity route, as opposed to a situation where if it were capable of demonstration, that the prosecution consistently, case after case, said I will not have a black on one of my juries or I will not have a Pole on one of my juries, I will not have an Armenian on one of my juries, no matter who the defendant is, no matter what the circumstances are, then you're into a different question.

Motion

Further, it seems to me, though the Supreme Court in Swayne against Alabama did not refer to it, it seems sort of self-evident that if in a single case you had a pattern of excusals, coupled with a flat admission on the part of the prosecution that was being exercised on racial or national heritage grounds, and not on the basis of affinity, you would again have a situation that would take it out of the presumptively correct and acceptable mode of exercise for peremptory challenges on the basis of potential affinity.

But of course we don't have either of those situations in this case.

There has been no suggestion, indeed it seems to me that your predecessor as counsel, Mr. Deckler, specifically disavowed the claim that the prosecution was exercising the challenges on the basis of race as opposed to potential affinity, and specifically disavowed any suggestion there has been a consistent pattern in a number of cases where that would suggest that the prosecution was doing any such a thing.

There is authority based upon cases out of California and Massachusetts, and indeed one written by Judge Framer of this court in New York County, holding that potential affinity or group affiliation, as it is called sometimes, is also objectionable and violation of the constitutional provision guaranteeing equal protection of the laws, among possibly others, but they are in a distinct minority, at variance with the Supreme Court's holding in Swayne against Alabama, and hold a viewpoint with which this Court specifically disagrees.

More on that, of course, when the decision which I have made reference to is filed. I'm sure you'll have no trouble getting a copy of it.

MR. WILTSHIRE: Yes. Thank you.